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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/723,692	11/26/2003	James B. McCormick	46521-56177	8923

21888 7590 09/17/2010

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ART UNIT	**PAPER NUMBER**
1797	

NOTIFICATION DATE	DELIVERY MODE
09/17/2010	ELECTRONIC

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/723,692
Filing Date: November 26, 2003
Appellant(s): MCCORMICK, JAMES B.

Mr. Kevin M. Kercher
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/1/10 appealing from the Office action mailed 3/1/10.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 1-7 are rejected and pending in the application.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

3,996,006	PAGANO	12-1976
3,537,636	ROCHETTE	11-1970
5,817,032	WILLIAMSON,IV	10-1998
5,812,312	LORINCZ	9-1998
5,932,430	LARKA	8-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. **Claims 1, 2, and 6** are rejected under 35 U.S.C. 102(b) as being anticipated by Pagano (US 3996006).

As to claim 1, in figs. 1-5, Pagano discloses a device, comprising: a foldable liquid permeable sheet (i.e. 2) having edges; a liquid permeable target (i.e. 26) disposed

on the foldable liquid permeable sheet within the edges of the liquid permeable sheet and attached with a glue spot (i.e. 28, 32, 34, 64, 76, and/or 78), thereby providing extended flap portions which flap portions are foldable to overlap the liquid permeable target; and a malleable material securing strip (i.e. area where 52 is located and 14 (tab)) attached to the foldable liquid permeable sheet of a length sufficient to secure the folded flap portions overlapping the liquid permeable target. With regard to the histological examination liquid claim language, such claim language does not appear to structurally define the claimed device. (i.e. col. 1, line 55 to col. 2, line 62).

As to claim 2, Pagano discloses that the malleable material securing strip is attached at an edge of the liquid permeable sheet (see, i.e., area where 52 is located and 14 (tab) of figs. 1-2).

As to claim 6, Pagano discloses that the liquid permeable target is a liquid permeable paper sheet having a glue spot located thereon for attaching the examination liquid permeable target to the foldable examination liquid permeable sheet (see, i.e., 28, 32, 34, 64, 76, and/or 78 of figs. 1-4, col. 1, line 55 to col. 2, line 12, language after "for" is intended use language).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

2. **Claims 3 and 4** are rejected under 35 U.S.C. 103(a) as being unpatentable over Pagano in view of Rochette (US 3537636).

See Pagano *Supra*.

Pagano does not specifically disclose having a malleable securing strip comprising a metal wire or a metal foil.

In figures 1-4, Rochette discloses an invention consisting of a reclosable bag formed from a sheet of flexible material. The bag further comprises a bendable metal wire and a pair of flexible coverings strips (i.e. metal foil), which are sealed together and the wire is sandwiched between so that the wire is embedded between the strips (i.e. column 2, line 70 to column 3, line 8).

At the time of the invention, it would have been obvious to a person of ordinary skill in the art to modify the malleable securing strip of Pagano, with a metal wire or with a metal foil because it would beneficial to have a sealing means that provides reinforcement.

3. **Claim 5** is rejected under 35 U.S.C. 103(a) as being unpatentable over Pagano in view of Williamson et al. ("Williamson," US 5817032).

See Pagano *supra*.

Pagano does not specifically disclose a release agent coated on the liquid permeable target.

Williamson discloses in his abstract, placing a tissue biopsy sample on a tissue trapping and supporting material that can withstand tissue preparation procedures and which can be cut with a microtome. Williamson further discloses spraying a thin layer of agar or other gel over the tissue and filter (i.e. col. 16, lines 43-59).

At the time of the invention, it would have been obvious to a person of ordinary skill in the art to modify Pagano's liquid permeable target by adding a binder, such as agar, to the specimen because it would insure that the loose or smaller pieces of specimen would remain on the sheet 26 during transport to the physician's office.

4. **Claim 7** is rejected under 35 U.S.C. 103(a) as being unpatentable over Pagano in view of Lorincz (US 5812312).

See Pagano *supra*.

Pagano does not specifically disclose an X and Y coordinate marking lines centered on the liquid permeable target.

Lorincz discloses in FIGS. 1 and 2, a microscope slide 11 having a viewing area 12, a dye 13 applied to the viewing area 12 for staining a biological sample 14, and a flexible transparent tape or film 16 attached to the slide 11 by means of a weak adhesive (not shown) such that the film 16 can be peeled back to expose the viewing area 12 for placement of the biological sample 14 thereon for intermixture with the dye 13, and replaced such that the stained sample can be viewed under a microscope.

Alternatively, the dye 13 can be applied to the film 16 at a location opposite the viewing area 12 of the slide 11. For example, the dye may be admixed with the adhesive on the film. The microscope slide can be either rigid or flexible. Rigid slides are well known in the art and typically comprise glass or hardened plastic; however, flexible slides are not previously known in the art. A flexible slide allows the slide 11 to be folded over or bent such that the viewing area 12 is presented to be touched directly to the specimen or suspected tissue lesion 21 (e.g. syphilitic chancre) in order to obtain a sample therefrom, as illustrated in FIG. 5. Other features which are beneficial include the addition of size references, such as fluorescent microspheres of known dimension (e.g. 1 uM), to the surface of the slide or the film such that they coincide with the field of focus of the specimen. For example, the microspheres can be attached to the adhesive on the film or the microspheres may be placed in the dye before application of the dye to the slide such that they are held to the slide with the subsequently dried dye. Microspheres 24 applied to the surface of culture media 23 are illustrated in FIG. 4. This facilitates focusing the microscope and provides an internal reference standard for size, which is preserved for photomicrography or video image capture. Other reference standards, such as a sizing grid 19 or the like, can also be incorporated as by etching or photographic reproduction onto the surface of the slide or film to allow sizing and quantitation of cells, microorganisms or the like. (i.e. col. 3, line 20 to col. 4, line 49).

At the time of the invention, it would have been obvious to a person of ordinary skill in the art to modify Pagano's liquid permeable target by incorporating a reference

standard grid on Pagano's liquid permeable target because it would be desirable to have a system to allow the analyst to easily take measurements of the sample.

5. **Claims 1, 2, and 6** are rejected under 35 U.S.C. 103(a) as being unpatentable over Larka et al. ("Larka," US 5932430) in view of Pagano.

As to claim 1, in figs. 1-2, Larka discloses a device, comprising: a foldable liquid permeable sheet (i.e. 10) having edges; and a liquid permeable target (i.e. 20) disposed on the foldable liquid permeable sheet within the edges of the foldable examination sheet and attached with a glue spot (i.e. col. 7, line 65 to col. 8, line 2), thereby providing extended flap portions which flap portions are foldable to overlap the liquid permeable target. With regard to the histological examination liquid, such claim language does not structurally further define the claimed device. (i.e. col. 3, lines 42-54 and col. 4, lines 11-23).

As to claims 1 and 2, Larka does not specifically disclose a malleable securing strip attached at an edge of the liquid permeable sheet.

Pagano discloses a malleable securing strip attached at an edge of the liquid permeable sheet (see *supra*).

At the time of the invention, it would have been obvious to a person of ordinary skill in the art to modify Larka's liquid permeable sheet by incorporating a malleable securing strip, as disclosed by Pagano, because it would be desirable to prevent Larka's front panel from being inadvertently opened.

As to claim 6, the modified Larka discloses that the liquid permeable target is a liquid permeable paper sheet having a glue spot located thereon for attaching the

examination liquid permeable target to the foldable examination liquid permeable sheet (i.e. col. 7, line 55 to col. 8, line 15, language after "for" is intended use language).

(10) Response to Argument

35 U.S.C. 102(b) rejection of claims 1, 2, and 6 by Pagano

In response to appellant's argument that Pagano does not disclose a "foldable histological examination liquid permeable sheet" but an impermeable cardboard device with flaps that open to allow the physician to apply a peroxide solution, the Office respectfully disagrees. The Office disagrees with appellant's argument based on the following three reasons. First, for an anticipatory rejection, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art. Here, it appears that Pagano anticipates the following claim language at issue, "foldable histological examination liquid permeable sheet," because Pagano inherently discloses a permeable paper or cardboard sheet (2). Generally, a piece of paper and cardboard are inherently porous materials. That is why, in industry, it is common to coat the paper or cardboard with a waterproof coating to make these materials impermeable. Pagano prevents the specimen or the developing solution from flowing through the paper or cardboard liquid permeable sheet by having glue spots (see col. 1, line 64 to col. 2, line 12 and col. 2, lines 52-62). These glue spots are coated only on certain portions (see the shaded portions in fig. 1, 4, and 5) of Pagano's sheet (2). Overall, it

appears that Pagano properly anticipates the claim language at issue because Pagano's paper or cardboard sheet is inherently made of a liquid permeable material.

Second, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification without importing into the claim, limitations that are not part of the claim. In appellant's originally filed specification, the term, "permeable sheet," does not appear to be explicitly defined because appellant recites on p. 4, para. [0018] that the "permeable sheet 12 is a sheet of filter-type paper or similar porous paper that is permeable to processing fluids and/or molten embedding wax, but retains a tissue specimen during processing." Appellant further recites that "because permeable, filter-type papers come in a wide range of permeability, thickness, and strengths, many types of papers will work as permeable sheet 12 as long as the sheet is porous to the typical processing fluids used in histological preparation in an efficient manner according to routine histological procedures while retaining tissue specimens 1 mm or smaller in size." In light of appellant's recitation of the term, "permeable sheet," it appears that the term is broadly defined and is not limited by this recitation in the specification because appellant recites "similar porous paper" and "many types of paper," which would appear to encompass many types of paper that are capable of being porous to fluids. Therefore, in light of appellant's recitation in the specification, it would appear that Pagano properly reads on the term, "permeable sheet," since Pagano discloses a sheet (2), made of a permeable paper or cardboard material.

Lastly, while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. Because the pending claims at issue are directed to an apparatus, the Office interpreted the "foldable histological examination liquid permeable sheet," claim language in terms of structure rather than function. The structural terms recited in the claim language at issue appear to be "permeable sheet" and the functional terms are "foldable" and "histological examination liquid." Based on this interpretation, it appears that the claim language is not distinguishable from Pagano's device because Pagano discloses a paper or cardboard sheet that is inherently made of a permeable material and is capable of being foldable and permeable to histological examination liquid.

In response to appellant's argument that Pagano's absorbent paper 26 *could be* contaminated if the closure flap was permeable, the Office does not find this argument to be persuasive. While the Office should consider all rebuttal arguments and evidence presented by the appellant (or generally by appellant's counsel), arguments of counsel cannot take the place of factually supported objective evidence. Here, the Office would like to point out that because appellant states, "could be" in the argument, it appears that appellant's argument is based on unsubstantiated subjective evidence about Pagano's permeable sheet.

In response to appellant's argument that if Pagano discloses a permeable sheet, it would destroy the Appellant's invention, the Office does not find this argument to be persuasive. The Office does not find appellant's argument to be persuasive for the

following two reasons. First, as stated above, while the Office should consider all rebuttal arguments and evidence presented by the appellant (or generally by appellant's counsel), arguments of counsel cannot take the place of factually supported objective evidence. Here, it appears that appellant's argument is based on unsubstantiated evidence about the outcome of a hypothetical invention involving the combination of Pagano's permeable sheet and appellant's invention.

Second, arguments that the alleged anticipatory prior art is nonanalogous art or teaches away from the invention or is not recognized as solving the problem solved by the claimed invention, or the proposed modification would destroy the invention, are not germane to a rejection under section 102. A question of whether a reference is analogous art is not relevant to whether that reference anticipates. A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than that of the claimed invention, yet the reference is still anticipatory if it explicitly or inherently discloses every limitation recited in the claims. Here, because claims 1, 2, and 6 are rejected under 35 U.S.C. 102(b) by Pagano, appellant's argument regarding the outcome of a hypothetical proposed modification of appellant's invention is not germane to a rejection under section 102.

In response to appellant's argument that since Pagano's foldable sheet must be open to receive the peroxide solution, this clearly indicates that the cardboard foldable sheet in Pagano is liquid impermeable, the Office respectfully disagrees. The Office disagrees with appellant's argument for the following three reasons. First, as stated above, arguments that the alleged anticipatory prior art is nonanalogous art or teaches

away from the invention or is not recognized as solving the problem solved by the claimed invention, or the proposed modification would destroy the invention, are not germane to a rejection under section 102. A question of whether a reference is analogous art is not relevant to whether that reference anticipates. A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than that of the claimed invention, yet the reference is still anticipatory if it explicitly or inherently discloses every limitation recited in the claims. Here, because claims 1, 2, and 6 are rejected under 35 U.S.C. 102(b) by Pagano, appellant's argument regarding the outcome of a hypothetical proposed modification of appellant's invention is not germane to a rejection under section 102. Furthermore, Pagano's sheet (2) is inherently permeable because paper or cardboard sheet are commonly known in the art to be permeable materials.

Second, appellant's assertion about the method of using Pagano's device appears to be unsubstantiated subjective evidence and appears to suggest that appellant's claimed sheet is impermeable as well since appellant's assertion that Pagano's foldable sheet must be open to receive the solution is similar to how appellant's foldable sheet must also be open to receive the specimen. Appellant recites on pages 3-4, para. [0014]-[0015], that the sample is placed on the device, and then the flap portion of the sheet are folded to overlap the target containing the sample. In light of appellant's recitation, it appears that to convey to a person of ordinary skill in the art that appellant's sample is first placed on the "open" (or unfolded) sheet and then the sheet is "closed" by folding the sheet over the sample. Therefore, based on appellant's

line of reasoning regarding the method of using Pagano's invention, it would appear that appellant's sheet is also impermeable since it also must be open to receive a sample or the like.

Third, the Office finds it important to point out that figure 3 of appellant's drawings show that appellant's device is similar in construction to Pagano's device (see also pages 8-10, para. [0033]-[0038]. The similarities in construction between appellant's invention and Pagano's device appear to clearly show that both must be open to receive a sample or the like. Therefore, since the method of using Pagano's device is similar to the method of using appellant's invention, Pagano properly discloses a permeable sheet.

In response to appellant's argument that *if* Pagano's flap was liquid permeable, the absorbent paper impregnated with a reagent *could be* ruined by liquid passing through the flap into the absorbent paper, the Office does not find this argument to be persuasive. As stated above, while the Office should consider all rebuttal arguments and evidence presented by the appellant (or generally by appellant's counsel), arguments of counsel cannot take the place of factually supported objective evidence. Here, the Office would like to point out that because appellant states, "if" and "could be" in the argument, it appears that appellant's argument is based on unsubstantiated subjective evidence about Pagano's permeable sheet.

In response to appellant's argument regarding the reason for the flap in Pagano, the Office respectfully does not find this argument to be persuasive. As stated above, arguments that the alleged anticipatory prior art is nonanalogous art or teaches away

from the invention or is not recognized as solving the problem solved by the claimed invention, or the proposed modification would destroy the invention, are not germane to a rejection under section 102. A question of whether a reference is analogous art is not relevant to whether that reference anticipates. A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than that of the claimed invention, yet the reference is still anticipatory if it explicitly or inherently discloses every limitation recited in the claims. Here, because claims 1, 2, and 6 are rejected under 35 U.S.C. 102(b) by Pagano, appellant's argument regarding the reason for the flap of Pagano is not germane to a rejection under section 102. Furthermore, because Pagano's sheet (2) is inherently permeable for the reasons stated above, Pagano properly anticipates the following claim following at issue, "foldable histological examination liquid permeable sheet."

In response to appellant's argument that the liquid passing onto the absorbent paper would literally destroy the absorbent paper for its desired purpose by diluting and removing both the stool specimen and the reagent, the Office does not find appellant's argument to be persuasive. As stated above, arguments that the alleged anticipatory prior art is nonanalogous art or teaches away from the invention or is not recognized as solving the problem solved by the claimed invention, or the proposed modification would destroy the invention, are not germane to a rejection under section 102. A question of whether a reference is analogous art is not relevant to whether that reference anticipates. A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than

that of the claimed invention, yet the reference is still anticipatory if it explicitly or inherently discloses every limitation recited in the claims. Here, because claims 1, 2, and 6 are rejected under 35 U.S.C. 102(b) by Pagano, appellant's argument that the liquid passing onto the absorbent paper would literally destroy Pagano's absorbent paper for its desired purpose is not germane to a rejection under section 102. Furthermore, because Pagano's sheet (2) is inherently permeable for the reasons stated above, Pagano properly anticipates the following claim following at issue, "foldable histological examination liquid permeable sheet."

In response to appellant's argument that the proper application of a reference against a device described and claimed in a patent application requires broadly that the anticipatory device be substantially the same as the anticipated device in function, structure, and result, the Office respectfully disagrees. The Office disagrees with appellant's argument for the following two main reasons. First, for an anticipatory rejection, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art. Here, Pagano properly anticipates claims 1, 2, and 6 in "structure" because Pagano discloses a sheet (2) that is inherently permeable for the reasons stated above.

Second, the Office disagrees with appellant's assertion that the anticipatory prior art reference must be substantially the same as the anticipated device in "function" and

"result" because features of an apparatus-type of invention must be distinguished from the prior art in terms of structure rather than function, and arguments that the alleged anticipatory prior art is nonanalogous art or teaches away from the invention or is not recognized as solving the problem solved by the claimed invention, or the proposed modification would destroy the invention, are not germane to a rejection under section 102. A question of whether a reference is analogous art is not relevant to whether that reference anticipates. A reference may be directed to an entirely different problem than the one addressed by the inventor, or may be from an entirely different field of endeavor than that of the claimed invention, yet the reference is still anticipatory if it explicitly or inherently discloses every limitation recited in the claims. Here, while functional language does not distinguish the claimed apparatus-type of invention to the prior art's device, the Office has provided sufficient reasoning above to support the finding that Pagano's sheet is capable of performing the claimed functions, which include the ability to be foldable and the ability to be permeable to histological examination liquid.

In response to appellant's argument that cardboard and paper are not inherently liquid permeable and many papers and cardboards are liquid impermeable, the Office respectfully disagrees. To establish inherency, the Office must provide rationale or extrinsic evidence to make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Here, Pagano discloses a "liquid permeable sheet" because, like appellant's permeable paper sheet, Pagano's sheet is made of paper. Furthermore, persons of ordinary skill in the art would not correlate paper or cardboard with the term

"impermeable." For example, if a person were to try to use a piece of paper or cardboard as an umbrella in a rain storm, a person would not have to make any probability or possibility in determining that the raindrops would quickly permeate through the paper or cardboard because persons of ordinary skill would recognize that water and cardboard do not possess the property of being liquid impermeable since they are liquid permeable materials. In another example, as suggested by appellant, appellant asserted that a disposable paper or cardboard coffee cup is liquid impermeable. The Office disagrees with the instant assertion because paper and cardboard possess the inherent property of being liquid permeable materials. Because of the inherent permeable property of paper and cardboard, a disposable paper or cardboard coffee cup is generally coated on the inside with an impermeable layer or the like to prevent coffee from permeating through the paper or cardboard material. Thus, it is not the paper or cardboard material of the cup that possess the impermeable property, it is the coating inside the cup that possesses the impermeable property. In Pagano, Pagano discloses glue spots to prevent migration of the liquid and to affix the target to the sheet. While Pagano's sheet is permeable because it is made of paper of cardboard, certain portions are made impermeable due to the addition of the glue spots. It is commonly known in the art that glue spots are liquid impermeable. Therefore, Pagano's paper or cardboard sheet is inherently permeable while the glue spots are liquid impermeable.

In response to appellant's argument that Pagano does not disclose a malleable securing strip but rather a slit, the Office respectfully disagrees. The Office disagrees

with appellant's assertion for two reasons. First, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification without importing into the claim, limitations that are not part of the claim. On page 7, para. [0028], appellant recites that the "malleable securing strip 18 *can* be any material that is formable or malleable, but it is preferred that strip 18 is either a metal wire or a strip of heavy metal foil. The wire or foil needs to have appropriate dimensions to allow for a one time use-easy closure and clamping, as well as, positive release of extended flap portions 16a-d." Because appellant's definition of the term, "malleable securing strip," begins with the word "can," and further recites that the malleable securing strip can be "any material," the claim term is not limited by the specification. Therefore, the claimed "strip" encompasses many different types of strips that are capable of being malleable and securable. In light of appellant's broad definition of the claim term, Pagano properly reads on the claimed "malleable material securing strip" because Pagano discloses a tab (14) made of cardboard or paper, which are malleable materials, and Pagano discloses that the tab is securable because when it passes through the slit 16 and slit 18, it locks the cover in the closed position (see col. 1, lines 55-53).

Second, while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. Because the pending claims at issue are directed to an apparatus, the Office interpreted the "malleable material securing strip," claim language in terms of structure rather than function. The structural terms recited in

the claim language at issue appear to be "material" and "strip" and the functional terms are "malleable" and "securing." Based on this interpretation, it appears that the claim language is not distinguishable from Pagano's device because Pagano discloses a strip that is a tab made of paper or cardboard, which are malleable materials, and that the is for locking the cover, which address the "securing" function.

In response to appellant's argument that Pagano does not disclose a histological examination liquid permeable target attached to the foldable histological examination liquid permeable sheet with a spot of glue, the Office respectfully disagrees. For an anticipatory rejection, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art. Here, in one embodiment, Pagano discloses that the glue at 28, 32, and 34 are applied on these areas of the permeable sheet 2 to adhere the permeable target 26 to panels 4 and 6, which are part of the permeable sheet 2. Furthermore, in another embodiment, Pagano discloses in figure 5, that the permeable sheet 2 comprises two liquid permeable targets, 72 and 74, that are attached to the permeable sheet 2 with an epoxy resin, which are indicated by numerals 76 and 78. Therefore, Pagano properly anticipates the claim language regarding the attachment of the permeable target to the permeable sheet with a spot of glue.

In response to appellant's argument that Pagano's device does not anticipate the claim language recited in the preamble, the Office respectfully disagrees. The claim preamble must be read in the context of the entire claim. The determination of whether preamble recitations are structural limitations or mere statements of purpose or use can be resolved only on review of the entirety of the record to gain an understanding of what the inventors actually invented and intended to encompass by the claim. If the body of a claim fully and intrinsically sets forth all of the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of any of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction. Here, in light of the context of the entire claim 1 and appellant's specification, it appears that the structural limitation claimed in the preamble is the "specimen retaining device" because the terms, "histological" and "for processing tissue" appear to be terms of purpose or use. For example, with regard to the term, "histological," based on appellant's specification, appellant's claimed "foldable histological examination liquid permeable sheet" is not described to be a "special" or "distinguishable" type of permeable sheet that is exclusively used for histological examinations and processing tissue because appellant broadly describes that the "foldable histological examination liquid permeable sheet" as a "sheet of filter-type paper or similar porous paper." In light of appellant's description of the term, "histological," persons skilled in the art would recognize that these materials may be used for many different applications, other than for histological purposes, which include stool specimen analysis. Also, the breadth of

the terms, "histological," and "processing tissue," in the context of claim 1 do not appear to limit the structural feature of the permeable sheet, because, as appellant noted on pages 10-11 of appellant's brief, "histology" is the anatomical study of microscopic structure of animal and plant tissues, and "tissue" is generally defined as an aggregation of cells and intercellular matter. In the context of claim 1, the definitions of these terms do not appear to structurally limit the claimed invention. Therefore, it appears that the terms in the preamble, "histological" and "for processing tissue," appear to be recitations of the purpose or intended use of the claimed invention, rather than any distinct definition of any of the claimed invention's limitations.

In response to appellant's argument that the area defined by numeral 52 as being the securing strip is either a piece of hard glue that is not located at the end or just a portion of the blank 2, the Office respectfully disagrees. The area indicated by numeral 52 was intended by the Office to indicate the tab, which is also indicated by reference numeral 14. It would appear that persons skilled in the art would recognize that the area indicated by 52 is equivalent to appellant's claimed malleable material securing strip since Pagano discloses that the tab is used for locking the cover in a closed position. Furthermore, persons skilled in the art would recognize that the area indicated by 52 (tab) is not a piece of hard glue since Pagano clearly discloses which areas of the device are covered with glue.

In response to appellant's argument that Pagano's glue is to fold the panels of the blank together and not secure a histological examination liquid permeable target to a foldable histological examination liquid permeable sheet, the Office does not find

appellant's argument to be persuasive. For an anticipatory rejection, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art. Here, in one embodiment, Pagano discloses that the glue at 28, 32, and 34 are applied on these areas of the permeable paper sheet 2 to adhere the permeable target 26 to panels 4 and 6, which are part of the permeable sheet 2. Furthermore, in another embodiment, Pagano discloses in figure 5, that the permeable sheet 2 comprises two liquid permeable targets, 72 and 74, that are attached to the permeable sheet 2 with an epoxy resin, which are indicated by numerals 76 and 78. Therefore, Pagano properly anticipates the claim language regarding the attachment of the permeable target to the permeable paper sheet with a spot of glue.

35 U.S.C. 103(a) rejection of claims 3 and 4 over Pagano in view of Rochette

In response to appellant's argument that a person of ordinary skill in the art would not make a substitution of the wire disclosed in Rochette for the slit disclosed in Pagano if this substitution would destroy the function and purpose of the stool sampling device disclosed in Pagano, the Office respectfully disagrees. First, the Office will emphasize again that the area indicated by numeral 52 was intended by the Office to indicate the tab, which is also indicated by reference numeral 14. It would appear that persons skilled in the art would recognize that the area indicated by 52 is equivalent to

appellant's claimed malleable material securing strip since Pagano discloses that the tab is used for locking the cover in a closed position. Furthermore, persons skilled in the art would recognize that the area indicated by 52 (tab) is not a piece of hard glue since Pagano clearly discloses which areas of the device are covered with glue.

Second, the combination proposed by the Office would not destroy the function and purpose of Pagano's invention because Pagano and Rochette disclose a device comprising a closure feature. In Pagano, he discloses a tab for locking the cover. In Rochette, he discloses a band 16 of reinforcing material which consists of a wire 17 and a pair of strips 18 of flexible sheet material, which are made of a metal material and used for as a means for closing a bag (see col. 1, line 72 to col. 2, line 47). In light of the prior art references being analogous art, it would appear that persons skilled in the art would recognize that having a bendable metal wire or a metal foil in place of Pagano's tab would not destroy the function and purpose of Pagano's device since it would appear to improve the function and purpose of Pagano's device by having a durable closure means that provides reinforcement to Pagano's locking mechanism.

35 U.S.C. 103(a) rejection of claim 5 over Pagano in view of Williamson

In response to appellant's argument that adding a binder and using a tissue trapping material would appear to destroy the invention disclosed in Pagano and prevent an even and consistent chemical reaction between the stool sample and the reagent from taking place, the Office does not find appellant's argument to be persuasive. First, the Office does not find that adding a binder would destroy Pagano's

invention because the binder would appear to improve Pagano's invention since it would insure that the loose and/or smaller pieces of the sample would remain on Pagano's permeable target (26) during transport to the physician's office.

35 U.S.C. 103(a) rejection of claim 7 over Pagano in view of Lorincz

In response to appellant's argument that Lorincz's grid is not a centered X and Y axis, the Office respectfully disagrees. Based on figure 1 of Lorincz, persons of ordinary skill would recognize that Lorincz's sizing grid 19 has X and Y coordinate marking lines are centered on the slide (see also col. 3, line 20 to col. 4, line 49).

In response to appellant's argument that Lorincz teaches away from appellant's invention, the Office respectfully disagrees. A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. Claim 7 claims an X and Y coordinate marking lines centered on the histological examination liquid permeable target. Lorincz discloses a foldable microscope slide designed for supravital staining of cells and microorganisms in a biological fluid or tissue sample, and adapted for immediate visual or instrumental examination of the stained cell (see col. 3, lines 3-18). Lorincz further discloses a sizing grid 19 or the like, that can also be incorporated as by etching or photographic reproduction onto the surface of the slide or film to allow sizing and quantitation of cells, microorganisms or the like. It would appear that claim 7 is obvious over Pagano in view of Lorincz because Lorincz discloses a grid as a sizing reference for tissue cells, which

is useful for appellant's purpose. Therefore, Lorincz's invention appears to be highly relevant to appellant's invention.

In response to appellant's argument that Lorincz destroys the appellant's invention for its intended purpose, the Office respectfully disagrees. As stated above, Lorincz discloses a foldable microscope slide designed for supravital staining of cells and microorganisms in a biological fluid or tissue sample, and adapted for immediate visual or instrumental examination of the stained cell (see col. 3, lines 3-18). Lorincz further discloses a sizing grid 19 or the like, that can also be incorporated as by etching or photographic reproduction onto the surface of the slide or film to allow sizing and quantitation of cells, microorganisms or the like. Lorincz, like appellant's invention, is concerned with processing a tissue sample. In addition, Lorincz, like appellant's invention, recognizes the benefit of incorporating an X and Y coordinate system on the foldable tissue device to serve as a sizing reference for tissue cells. Therefore, Lorincz's invention would not destroy appellant's invention for its intended purpose.

In response to appellant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case,

there is sufficient motivation for one of ordinary skill in the art to incorporate a reference standard grid on Pagano's liquid permeable target because Lorincz discloses that the standard grid is used for broad range of biological samples, which encompasses fecal specimens.

35 U.S.C. 103(a) rejection of claims 1, 2, and 6 over Larka in view of Pagano

In response to appellant's argument that Pagano does not disclose a "liquid permeable cover (8)," or as appellant describes as being a "closure flap" that is not permeable, the Office respectfully disagrees. First, the Office takes the position that Pagano inherently discloses a permeable paper or cardboard sheet (2), which encompasses Pagano's cover. See supra. Generally, a piece of paper and cardboard are inherently porous materials. That is why, in industry, it is common to coat the paper or cardboard with a waterproof coating to make these materials impermeable. Pagano prevents the specimen or the developing solution from flowing through the paper or cardboard liquid permeable sheet by having glue spots (see col. 1, line 64 to col. 2, line 12 and col. 2, lines 52-62). These glue spots are coated only on certain portions (see the shaded portions in fig. 1, 4, and 5) of Pagano's sheet (2). Overall, Pagano's paper or cardboard cover is inherently made of a liquid permeable material.

Second, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification without importing into the claim, limitations that are not part of the claim. In appellant's originally filed specification, the term, "permeable sheet," does not appear to be explicitly defined

because appellant recites on p. 4, para. [0018] that the "permeable sheet 12 is a sheet of filter-type paper or similar porous paper that is permeable to processing fluids and/or molten embedding wax, but retains a tissue specimen during processing." Appellant further recites that "because permeable, filter-type papers come in a wide range of permeability, thickness, and strengths, many types of papers will work as permeable sheet 12 as long as the sheet is porous to the typical processing fluids used in histological preparation in an efficient manner according to routine histological procedures while retaining tissue specimens 1 mm or smaller in size." In light of appellant's recitation of the term, "permeable sheet," it appears that the term is broadly defined and is not limited by this recitation in the specification because appellant recites "similar porous paper" and "many types of paper," which would appear to encompass many types of paper that are capable of being porous to fluids. Therefore, in light of appellant's recitation in the specification, it would appear that Pagano properly reads on the term, "permeable sheet," since Pagano discloses a sheet (2), made of a permeable paper or cardboard material.

In response to appellant's argument that Pagano would destroy appellant's invention, the Office respectfully disagrees. A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. Claims 1, 2, and 6 were directed to a specimen retaining device comprising a foldable permeable sheet that comprises a permeable target (another layer), which is affixed to the permeable sheet with glue, and a securing strip to close

and clamp the flap portions of the permeable sheet after the sheet is folded over the permeable target. Pagano disclosed a foldable permeable blank formed from paper or cardboard comprising a sheet of absorbent paper on the front panel of the blank. Pagano further disclosed that a specimen is placed on the absorbent paper, which is affixed to the blank with glue. Then the flap portions of the permeable blank were folded over the specimen on the permeable absorbent paper, and closed and clamped with a malleable securing strip, which is attached to the end of the permeable blank. Claims 1, 2, and 6 would have been obvious over Pagano because Pagano disclosed a retaining device that is substantially the same in construction to appellant's claimed retaining device and disclosed the benefit of having a specimen retaining device with this type of construction, which is useful for appellant's purpose. Therefore, because Pagano's invention does not teach away from appellant's invention, Pagano would not destroy appellant's invention.

In response to appellant's argument that Larka's paper card (10) is impermeable to fluids, the Office respectfully disagrees. First, the Office takes the position that Larka inherently discloses a permeable paper card (10). Generally, a piece of paper is inherently a porous material. That is why, in industry, it is common to coat the paper with a waterproof coating to make these materials impermeable. Overall, persons skilled in the art would recognize that Larka's paper card (10) is inherently made of a liquid permeable material. Second, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification without importing into the claim, limitations that are not part of the claim. In appellant's

originally filed specification, the term, "permeable sheet," does not appear to be explicitly defined because appellant recites on p. 4, para. [0018] that the "permeable sheet 12 is a sheet of filter-type paper or similar porous paper that is permeable to processing fluids and/or molten embedding wax, but retains a tissue specimen during processing." Appellant further recites that "because permeable, filter-type papers come in a wide range of permeability, thickness, and strengths, many types of papers will work as permeable sheet 12 as long as the sheet is porous to the typical processing fluids used in histological preparation in an efficient manner according to routine histological procedures while retaining tissue specimens 1 mm or smaller in size." In light of appellant's recitation of the term, "permeable sheet," it appears that the term is broadly defined and is not limited by this recitation in the specification because appellant recites "similar porous paper" and "many types of paper," which would appear to encompass many types of paper that are capable of being porous to fluids. Therefore, in light of appellant's recitation in the specification, it would appear that Larka properly reads on the term, "permeable sheet," since Larka discloses a card (2), made of permeable paper material.

In response to appellant's argument that the combination of two impermeable devices, Pagano and Larka, do not create a histological examination liquid permeable sheet by their combination, the Office respectfully disagrees. First, as stated above, the Office take the position that Pagano and Larka disclose a liquid permeable sheet, see supra. Second, in light of appellant's board definition of the term "permeable sheet" in appellant's specification, Pagano and Larka properly read on the term, "permeable

sheet," see supra. Therefore, because Pagano and Larka disclose a liquid permeable sheet, the combination of these prior art references would create a liquid permeable sheet.

In response to appellant's argument that the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, the Office respectfully disagrees. Claims 1, 2, and 6 were directed to a specimen retaining device comprising a foldable permeable sheet that comprises a permeable target (another layer), which is affixed to the permeable sheet with glue, and a securing strip to close and clamp the flap portions of the permeable sheet after the sheet is folded over the permeable target. Larka disclosed a specimen retaining device comprising a permeable paper card comprising a filter paper affixed to the card with glue. The permeable paper card is foldable and has flaps that fold over the filter paper. The filter paper is where the specimen is deposited. Pagano disclosed a foldable permeable blank formed from paper or cardboard comprising a sheet of absorbent paper on the front panel of the blank. Pagano further disclosed that a specimen is placed on the absorbent paper, which is affixed to the blank with glue. Then the flap portions of the permeable blank were folded over the specimen on the permeable absorbent paper, and closed and clamped with a malleable securing strip, which is attached to the end of the permeable blank. Therefore, claims 1, 2, and 6 are obvious over Larka in view of Pagano because it would have been obvious to incorporate Pagano's securing strip to the front panel of Larka's card, especially because Larka and Pagano are similar in construction, i.e., 3 panels. Furthermore, since Larka and Pagano are similar in construction, it would not

that incorporating Pagano's securing strip to Larka's front panel would make Larka's device inoperable for its intended purpose.

In response to appellant's argument that Pagano teaches away from appellant's invention, the Office respectfully disagrees. A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. Claims 1, 2, and 6 were directed to a specimen retaining device comprising a foldable permeable sheet that comprises a permeable target (another layer), which is affixed to the permeable sheet with glue, and a securing strip to close and clamp the flap portions of the permeable sheet after the sheet is folded over the permeable target. Pagano disclosed a foldable permeable blank formed from paper or cardboard comprising a sheet of absorbent paper on the front panel of the blank. Pagano further disclosed that a specimen is placed on the absorbent paper, which is affixed to the blank with glue. Then the flap portions of the permeable blank were folded over the specimen on the permeable absorbent paper, and closed and clamped with a malleable securing strip, which is attached to the end of the permeable blank. Claims 1, 2, and 6 would have been obvious over Pagano because Pagano disclosed a retaining device that is substantially the same in construction to appellant's claimed retaining device and disclosed the benefit of having a specimen retaining device with this type of construction, which is useful for appellant's purpose. Therefore, Pagano's invention does not teach away from appellant's invention.

In response to appellant's argument that Larka teaches away from appellant's invention, the Office respectfully disagrees. A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. Claims 1, 2, and 6 were directed to a specimen retaining device comprising a foldable permeable sheet that comprises a permeable target (another layer), which is affixed to the permeable sheet with glue, and a securing strip to close and clamp the flap portions of the permeable sheet after the sheet is folded over the permeable target. Larka disclosed a specimen retaining device comprising a permeable paper card comprising a filter paper affixed to the card with glue. The permeable paper card is foldable and has flaps that fold over the filter paper. The filter paper is where the specimen is deposited. Claims 1, 2, and 6 would have been obvious over Larka because Larka disclosed a retaining device that is similar in construction to appellant's claimed retaining device and disclosed the benefit of having a specimen retaining device with this type of construction, which is useful for appellant's purpose. Therefore, Larka's invention does not teach away from appellant's invention.

In response to appellant's argument that the area defined by numeral 52 as being the securing strip is either a piece of hard glue that is not located at the end or just a portion of the blank 2, the Office respectfully disagrees. The area indicated by numeral 52 was intended by the Office to indicate the tab, which is also indicated by reference numeral 14. It would appear that persons skilled in the art would recognize that the area indicated by 52 is equivalent to appellant's claimed malleable material

securing strip since Pagano discloses that the tab is used for locking the cover in a closed position. Furthermore, persons skilled in the art would recognize that the area indicated by 52 (tab) is not a piece of hard glue since Pagano clearly discloses which areas of the device are covered with glue.

In response to appellant's argument that Pagano does not disclose a malleable securing strip but rather a slit, the Office respectfully disagrees. The Office disagrees with appellant's assertion for two reasons. First, during patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification without importing into the claim, limitations that are not part of the claim. On page 7, para. [0028], appellant recites that the "malleable securing strip 18 *can* be any material that is formable or malleable, but it is preferred that strip 18 is either a metal wire or a strip of heavy metal foil. The wire or foil needs to have appropriate dimensions to allow for a one time use-easy closure and clamping, as well as, positive release of extended flap portions 16a-d." Because appellant's definition of the term, "malleable securing strip," begins with the word "can," and further recites that the malleable securing strip can be "any material," the claim term is not limited by the specification. Therefore, the claimed "strip" encompasses many different types of strips that are capable of being malleable and securable. In light of appellant's broad definition of the claim term, Pagano properly reads on the claimed "malleable material securing strip" because Pagano discloses a tab (14) made of cardboard or paper, which are malleable materials, and Pagano discloses that the tab is securable because when

it passes through the slit 16 and slit 18, it locks the cover in the closed position (see col. 1, lines 55-53).

Second, while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. Because the pending claims at issue are directed to an apparatus, the Office interpreted the "malleable material securing strip," claim language in terms of structure rather than function. The structural terms recited in the claim language at issue appear to be "material" and "strip" and the functional terms are "malleable" and "securing." Based on this interpretation, it appears that the claim language is not distinguishable from Pagano's device because Pagano discloses a strip that is a tab made of paper or cardboard, which are malleable materials, and that the is for locking the cover, which address the "securing" function.

In response to appellant's argument that rejections on obviousness cannot be sustained by mere conclusory statements, the Office does not find that the rejection of Larka in view of Pagano is based on a mere conclusory statement. Exemplary rationales that may support a conclusion of obviousness include:

(A) Combining prior art elements according to known methods to yield predictable results;

(B) Simple substitution of one known element for another to obtain predictable results;

(C) Use of known technique to improve similar devices (methods, or products) in the same way;

(D) Applying a known technique to a known device (method, or product) ready for improvement to yield predictable results;

(E) " Obvious to try " – choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success;

(F) Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art;

(G) Some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

Here, the Office will address rationale (G), as an example to support the Office's position that the obviousness rejection is proper. To rejection a claim based on this rationale, the Office must articulate the following:

(1) a finding that there was some teaching, suggestion, or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings;

(2) a finding that there was reasonable expectation of success; and

(3) whatever additional findings based on the Graham factual inquiries may be necessary, in view of the facts of the case under consideration, to explain a conclusion of obviousness.

The Office has met all three factors because As for factor (1), the Office has indicated that there is a motivation in the reference and in the knowledge generally

available to one of ordinary skill in the art. In Pagano, he discloses a cover 8 that has a tab 14 which is adapted to pass through circular slit 16 in panel 4 and circular slit 18 in panel 6 *to lock the cover in the closed position*. Thus, the locking mechanism disclosed by Pagano would be a proper motivation for one of ordinary skill in the art to modify Larka's specimen retaining device. In another instance, one of ordinary skill in the art would be motivated to modify Larka's specimen retaining device by incorporating a securing strip because it would prevent Larka's front panel from being inadvertently opened. Thus, factor (1) is met.

As for factor (2), one of ordinary skill in the art would find that there was a reasonable expectation of success from incorporating a securing strip to Larka's retaining device.

As for factor (3), under Graham v. Deere standard, the three factors are met because the Office has indicated in the rejection above, that one of ordinary skill in the art would be motivated to modify Larka's front panel by incorporating a securing strip because it would be desirable to prevent Larka's device from being inadvertently opened. Furthermore, a closure means is known in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/LORE JARRETT/

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